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TABLE OF AUTHORITIES

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 336

LOUIS S. NELSON, WARDEN, CALIFORNIA STATE PRISON AT SAN QUENTIN,

Petitioner,

v.

JOE J. B. O'NEIL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

QUESTIONS PRESENTED

In a joint criminal trial before a jury the prosecution was allowed to introduce into evidence testimony by a police officer that during custodial interrogation of one of the accused, Runnels, he obtained from him an oral statement which, as reported in court by the officer, incriminated not only Runnels but also the other accused, respondent O'Neil. The questions presented are:

1. Whether the fact that Runnels took the stand and denied having made any statement removes the case from the rule of *Douglas v. Alabama*, 380 U.S. 415 (1965) and *Bruton v. United States*, 391 U.S. 123 (1968).

2. Whether, in light of the evidence properly admitted, the case against O'Neil was so overwhelming that a reviewing court should conclude that admission of the evidence of Runnels' statement was harmless beyond a reasonable doubt.

3. Whether, after the state courts have reviewed O'Neil's claim on both direct and collateral review, any policy underlying the doctrine of exhaustion of remedies would be served by requiring O'Neil to return to the state courts yet another time.

STATEMENT

A. THE TRIAL

Respondent O'Neil and a co-defendant, Runnels, were jointly tried and convicted by a California jury on charges of kidnapping for purposes of robbery, armed robbery and vehicle theft. (A. 103)[1] The prosecution's case was presented through the testimony of the victim and two policemen.

The victim testified that two men entered his parked car at gunpoint at 10:30 p.m. on the night of February 8, 1965, in the city of Los Angeles. According to the victim, they forced him to drive several blocks, and after taking about eight dollars from him and making him get out of the car, they drove off. (R.T. 10-22) The victim at once reported the crime to the police. (R.T. 23) Subsequently, at a line-

[1] "A." refers to the printed Appendix herein. "R.T." refers to the Reporters' Transcript of the State trial proceedings, on file with the Clerk. "Pet. Br." refers to the Brief for the Petitioner herein. It should be noted that the excerpts from the Reporters' Transcript printed in the Appendix do not always appear in order.

up (R.T. 27) and at trial (R.T. 13, 15), he identified O'Neil and Runnels as the two men who had committed the crime.

One of the two policemen, a Culver City patrol officer, testified that in the early morning hours of February 9 he had responded to a call from a liquor store manager concerning a "suspicious white vehicle with two male Negro occupants" circling the store. (R.T. 63, 67-68) When he followed the vehicle in his squad car, one of the occupants threw a gun from the vehicle. (R.T. 64) Thereupon, he stopped the vehicle and arrested its occupants. (R.T. 65-66) The vehicle belonged to the victim (R.T. 11, 63), and its occupants were O'Neil and Runnels. (R.T. 65) At the time of the arrest, the patrol officer had no knowledge of the robbery of the victim. (R.T. 84)

The second policeman, a City of Los Angeles investigating officer, stated that on the morning of February 10, after having obtained custody of O'Neil and Runnels (A. 131), he had a "conversation" with Runnels at the jail where he was being held. (A. 128) The officer testified that he advised Runnels of his rights (A. 129) and "stated to Mr. Runnels that his wife had told me that O'Neil was putting all the blame on him." (A. 137) According to the officer, Runnels then made an oral statement which, as reported by the officer, incriminated Runnels himself and identified O'Neil as the instigator and principal actor in the robbery. (A. 137-39)[2] The officer testified that no one other than Runnels and himself was present at the time of this statement (A. 129), and that no recording of the statement was made. (A. 142) (The officer testified that a second officer was present during a subsequent conversation with Runnels "to the same effect," but that no recording was made of this conversation either (A. 142).)

In anticipation of the officer's testimony, O'Neil's counsel had moved for a severance at the beginning of the trial (A.

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[2]The officer's testimony as to the substance of this statement is reproduced as an appendix to this brief, *infra*, p. 27.

174-176), and he objected to the admission of the testimony at the time it was offered. (A. 130-31) The court rejected both of these efforts to exclude the testimony, relying instead on instructions to the jury that the evidence of a statement by Runnels was not to be considered against O'Neil. (A. 137, 245-46)

Six witnesses appeared for the defense, including O'Neil and Runnels, each of whom took the stand on his own behalf. (R.T. 184, 216) The first witness, who identified herself as the common-law wife of Runnels, stated that the investigating officer informed her on February 11 (the day after the confession was supposed to have been made) that Runnels had as yet given no statement and that he would see that Runnels got only "five to ten" instead of "one to life" if she were to persuade Runnels to make a statement. (R.T. 137)

On both direct examination by his own counsel and cross-examination by the prosecutor, Runnels flatly denied making any statement of any kind to the investigating officer. (A. 150, 164-67) O'Neil's counsel did not examine Runnels. (A. 150)

O'Neil's mother and sister (as well as O'Neil and Runnels themselves) testified that between 9:00 p.m. and 11:00 on the night of February 8, 1965, O'Neil and Runnels were dancing and drinking in the O'Neil home. (R.T. 163, 175-76) O'Neil's mother further testified that the victim of the robbery had subsequently stated to her on the phone that "he wasn't for sure that he had the right boys." (R.T. 176-77)

O'Neil and Runnels both testified that at 11 p.m. on February 8 (one-half hour after the robbery had occurred), they left the O'Neil home together and hitch-hiked a ride in what later turned out to be the victim's car, which was then being driven by a man known to Runnels as "Gary" (A. 146) and to O'Neil as "James Garrett." (R.T. 220)[3]

[3]O'Neil later testified on cross-examination that while he knew how to get to where Garrett lived and had told the police about him, he didn't know the exact address of Garrett's abode and had not tried

According to their testimony, they were driven to the Top Cat Club, where Garrett consented to turn the keys of the car over to O'Neil and Runnels, instructing them to return the vehicle and park it near the Top Cat later that night. (A. 144-49; R.T. 216-24) The defendants' testimony as to the transfer of the car to their possession was corroborated by testimony from a patron of the Top Cat. (R.T. 144-51)

After securing the use of the car, O'Neil and Runnels drove off for Santa Monica, according to their testimony, to visit some girls. (A. 147; R.T. 225) O'Neil and Runnels testified that as they passed through Culver City, O'Neil discovered a gun in the glove compartment of the car while looking for a match. (A. 148, 164; R.T. 225-26) According to their testimony, they at once became "very uneasy" over having a gun for which they had no permit; hence, they turned around to go back to the Top Cat Club, drove into an alley to throw away the gun, and were immediately arrested by the Culver City patrol. (A. 148, 164; R.T. 226-29)

In his argument to the jury, the prosecutor relied on the circumstances of the arrest (A. 183-85) and on the officer's evidence of the Runnels statement (A. 184-86, 219-20) to corroborate the victim's identification (A. 184-86, 219-20). He invited the jury to weigh Runnels' obvious motivation to deny making the statement against the officer's asserted lack of motivation to claim falsely that a statement had been given. (A. 188-89, 223-24) Defense counsel stressed the possibility of a mistaken identification (A. 197-200, 208-11, 216) and relied on the substantial alibi evidence. (A. 206-07, 213-16) As noted above, the jury convicted both defendants on three counts of kidnapping for purposes of robbery, armed robbery and vehicle theft. (A. 103)

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to subpoena him as a witness. (R.T. 238-39) O'Neil further stated that he had been incarcerated since the night of his arrest and had had no opportunity to go by Garrett's residence. (R.T. 251)

B. SUBSEQUENT PROCEEDINGS

After the judgment of conviction was entered on June 17, 1965, respondent O'Neil appealed to the District Court of Appeals. (A. 103) On March 30, 1967, that court rejected his claim that the trial court had erred in failing to grant him a separate trial free of the prejudice arising from the State's introduction of the officer's testimony about a statement by Runnels. (A. 39-47) Following denials of a petition for rehearing and an application to recall the remittitur, O'Neil sought a writ of habeas corpus from the California Supreme Court on March 7, 1968, urging that the use in his trial of the evidence of a statement by Runnels was constitutional error. (A. 48-65) He expressly relied on the Sixth and Fourteenth Amendments in support of his claim. (A. 60) O'Neil's petition was denied on March 20, 1968. (A. 66)

Thereafter, on April 25, 1968, O'Neil petitioned for a writ of habeas corpus from the U.S. District Court for the Northern District of California. (A. 28) The District Court granted the writ, rejecting California's arguments that the error of admitting evidence of a statement by Runnels was harmless beyond a reasonable doubt and that federal habeas relief should be withheld because O'Neil might have a remedy in the state courts under *Bruton v. United States*, 391 U.S. 123 (1968), which came down during the pendency of the Federal habeas proceeding. (A. 103-07)

The Court of Appeals for the Ninth Circuit affirmed, one judge dissenting (A. 111-26; 422 F.2d 319), and this Court granted California's petition for a writ of certiorari, 400 U.S. 901 (Nov. 9, 1970), appointing the undersigned attorney to represent O'Neil in this Court. (In both the District Court and the Court of Appeals, as in the California Supreme Court, O'Neil appeared *in propria persona*. (A. 2, 5, 65))

SUMMARY OF ARGUMENT

This case involves a joint criminal trial before a jury in which the State put into evidence a police officer's testimony that an oral statement was made during custodial interrogation by one of the accused, Runnels. As reported in court by the officer, this statement incriminated both Runnels and the other accused, respondent O'Neil. Police testimony as to unrecorded oral accusations by suspected accomplices during in-custody questioning has long been recognized by courts to be at once powerfully damaging and extremely unreliable. Yet California asks this Court to hold that O'Neil's rights under the Confrontation and Due Process Clauses were not violated when such evidence was spread before the jury determining O'Neil's guilt, for the reason that Runnels took the stand and denied having made the statement attributed to him.

The position advanced by California is contrary to *Douglas v. Alabama*, 380 U.S. 415 (1965) and *Bruton v. United States*, 391 U.S. 123 (1968). In those cases the accused's right to be confronted with the witnesses against him was held to be denied not, as California would have it, simply because the allegedly accusing accomplice did not testify, but rather because he did not affirm the accusatory statement in open court before the jury and thereby expose himself to cross-examination by the accused.

Without such an affirmation of the accusation by the person allegedly making it, the accused cannot *cross-examine* his accuser. Analysis of the nature of the cross-examination demonstrates that if the alleged accuser will not affirm his accusation in court, the accused has at most an opportunity to *rebut* the evidence of the accusation. Thus, he may be able to offer the witness's present statement that he did not make the prior statement attributed to him, just as he can offer his own alibi testimony or any other type of evidence in denial that is available to him. But where an accused is incriminated by police testimony as to unrecorded oral accusatory statements reportedly made by a suspected

accomplice during custodial interrogation, the mere opportunity to rebut so inherently unreliable—yet devastating—an accusation is not an adequate substitute for the opportunity to cross-examine one's accusers that is guaranteed by the Sixth and Fourteenth Amendments.

The constitutional error of admitting the police officer's evidence of an accusation of O'Neil by Runnels cannot be said to have been harmless beyond a reasonable doubt. Through the testimony of six different witnesses, O'Neil established a consistent, unshaken alibi defense that placed him and Runnels away from the scene at the time of the offense and provided as explanation for his subsequent arrest in the victim's car. In view of this evidence, and the evidence of circumstances raising the possibility of a mistaken identification, the Court of Appeals correctly held it "more likely than not that Runnels' statement dispelled the doubts of the jury." 422 F.2d at 323.

Finally, since the California courts have had an opportunity on both direct and collateral reivew to pass on O'Neil's constitutional objections to the evidence of an accusation by Runnels, no basis exists in the doctrine of exhaustion of state remedies for requiring O'Neil to return to the California courts yet another time.

I. POLICE TESTIMONY AS TO AN UNRECORDED ORAL STATEMENT MADE BY A SUSPECT DURING CUSTODIAL INTERROGATION ACCUSING ANOTHER OF PARTICIPATION IN A CRIME IS INHERENTLY UNRELIABLE, YET DEVASTATING, EVIDENCE OF THE GUILT OF THE ACCUSED PERSON.

The kind of evidence challenged by respondent O'Neil in this case is one of the most unreliable known to the law; yet it is also one of the most devastating in its impact on the accused. As Justice Harlan has recently noted, English and American courts have for three centuries consistently refused to admit proof of "a confession of an accomplice

resulting from formal police interrogation" as evidence of the guilt of an accused, and such exclusion is "universally accepted." *Dutton v. Evans*, 400 U.S. 74 (Dec. 15, 1970) (opinion of Harlan, J.); see *Bruton v. United States*, 391 U.S. 123, 128 n. 3 (1968); *id.* at 138 (concurring opinion of Stewart, J.); *id.* at 141-42 (dissenting opinion of White, J.). The untrustworthiness and devastating effect of such evidence are the necessary starting point for a realistic assesment of whether O'Neil was accorded a constitutionally adequate opportunity to confront and cross-examine his alleged accuser.

The indicia of untrustworthiness attaching to the account of Runnels' reported statement are numerous. First, the alleged statement was admittedly an oral one that was not recorded or otherwise transcribed by the police. The risks of fabrication, distortion or simple error in reporting are manifestly greater in the case of alleged oral statements by suspects than when the statements are recorded or put in writing and signed by the suspect. See McCormick, *Evidence*, 225 n. 2, 238 (1954); also *Bridges v. Wixon*, 326 U.S. 135, 150-51, 153 (1945).

Second, the alleged statement was secured and testified to by a police officer charged with the duty of investigating the offense. Contrary to the assertion of the prosecutor in his argument to the jury, the officer was obviously not a totally objective medium of transmission, since he had a special interest in producing a solution for the reported offense. See *Dist. of Columbia v. Clawans*, 300 U.S. 617, 630-31 (1937); *In re Groban*, 352 U.S. 330, 340-41 (1957) (dissenting opinion of Black, J.). Moreover, only this officer was present when the statement was reportedly given, and only one other officer, who did not testify, was present when it was reportedly repeated.[4]

[4]The United States, in an *amicus* brief urging that States have the power to dispense with "strict confrontation" where reliable out-of-court statements are involved, has nonetheless stated that it "would have grave difficulty with a statute or judicially created rule of evidence which sought to authorize the admission into evidence in the

Third, the reported statement about the crime was made by one who was, according to the officer's testimony, an accomplice in the commission of the offense. The extreme unreliability even of in-court accomplice testimony has long been recognized, and this perception underlies the various special rules relating to accomplice testimony that courts and legislatures have from time to time adopted.[5] The recognition in law of the untrustworthiness of accomplice testimony has been well expressed in the following passage from an opinion of the Court of Appeals for the Fifth Circuit:

> "A skeptical approach to accomplice testimony is a mark of the fair administration of justice. From Crown political prosecutions, and before, to recent prison camp inquisitions, a long history of human frailty and governmental overreaching for conviction justifies distrust in accomplice testimony. Cobham's misplaced hope for immunity that helped send Raleigh to the Tower is on the same level with the hope of some narcotic peddler or some other poor

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trial of one conspirator of a confession made *to the police* by another after the conspiracy had terminated." Brief for the United States as Amicus Curiae, *Dutton v. Evans*, Oct. Term 1970, No. 10, p. 32 n. 24 (emphasis in original).

[5] It has long been the custom, both in England and in the United States, for the court not only to caution the jury as to the unusual untrustworthiness of the testimony of an accomplice, but to advise them not to convict on such testimony in the absence of some corroborating evidence. 7 Wigmore, *Evidence*, § 2056 (3d ed. 1940); Archbold, *Criminal Pleading*, § 1293 (37th ed. 1969); 30 Am. Jur.2d, Evidence, § 1151; see *Crawford v. United States*, 212 U.S. 183, 204 (1909). In many jurisdictions these rules of practice have been converted into rules of law. 7 Wigmore, *op. cit.*; Archbold, *op. cit.*; see *Cash v. Culver*, 358 U.S. 633, 637 (1959). Many cases are reported in which convictions based on accomplice testimony were reversed for undue restriction of the accused's right to bring out, on cross-examination, facts bearing on the credibility of the accomplice. 3A Wigmore, § 967 (Chadbourn rev. ed. 1970); cf. *Alford v. United States*, 282 U.S. 687 (1931). See *On Lee v. United States*, 343 U.S. 747, 757 (1952).

> wretch to save *his* skin by laying the entire blame on a friend or close associate." *Phelps v. United States,* 252 F.2d 49 (5th Cir. 1958).

As the foregoing quotation suggests, a fourth indication of the unreliability of Runnels' reported statement about O'Neil is that Runnels was under arrest and facing prosecution at the time he allegedly gave the statement. Under such circumstances, the hope for leniency in return for aiding the state provides the accomplice with a special "incentive to involve others," regardless of the fact or degree of their true involvement. See *Gordon v. United States*, 344 U.S. 414, 421-22 (1953); *Alford v. United States,* 282 U.S. 687, 693 (1931). Indeed, in England the normal suspicion of accomplice testimony incriminating an accused is decisively heightened when the accomplice is, at the time he gives his testimony, subject to criminal proceedings for the offense in question. In such a case it has been lately held that the admission of such testimony, though given in open court by the accomplice himself, requires that the conviction be quashed, notwithstanding the existence of other "overwhelming evidence" against the accused. *Regina v. Pipe,* 51 Crim. App. R. 17 (C.A. 1966); see Archbold, *Criminal Pleading,* § 1297 (37th ed. 1969).

A fifth factor bearing on the unreliability of the alleged statement by Runnels is the extent to which it is, as reported, a self-serving effort by Runnels, not merely to share, but to shift blame for the crime from Runnels and to O'Neil. Although the statement incriminates Runnels, it credits O'Neil with first suggesting the crime and with playing the major role in its execution. See Appendix, *infra*, p. 27. The unreliability of a blame-shifting statement of this type is reflected in the rule of evidence excluding any self-serving parts of an out-of-court statement admitted as a declaration against interest. See McCormick, *Evidence,* § 256 at 553 (1954).

A sixth factor making Runnels' reported statement unreliable evidence of O'Neil's guilt is the fact that it was reported

to have been given during custodial interrogation. In the past this Court has been keenly aware of the danger that incriminating statements may be unreliable when made in "the compelling atmosphere inherent in the process of in-custody interrogation." *Miranda v. Arizona*, 384 U.S. 436, 478 (1966). *See, e.g., Alford v. United States*, 282 U.S. 687, 693 (1931). While it has been urged that "the insistent and ever-present force of self-interest" (McCormick, *op. cit. supra*, § 109, at 226) can be expected to minimize the dangers of mistake and falsehood in confessions, this observation obviously has no application to in-custody statements that accuse other persons of crime.

Nor is there need to speculate in this case as to the psychological pressures that might have been brought to bear on Runnels during his interrogation. A seventh index of unreliability is the officer's testimony that Runnels' statement was obtained when he was informed that his wife had said that "O'Neil was putting all the blame on him." (A. 137) This testimony indicates that the officer was resorting to a common interrogation technique,[6] one that has received the approval of this Court even when the interrogator's statements about the suspected accomplice's confession or accusation are admittedly false. See *Frazier v. Cupp*, 394 U.S. 731 (1969). Manifestly, however, resort to such a strategem creates the gravest risk of unreliability insofar as it evokes statements from the suspect incriminating others, for the suspect's natural tendency to share or shift blame will be accentuated by his anger at his supposed betrayer.

Finally, it must be borne in mind that Runnels did deny having made the statement attributed to him, or any other statement, and there was some evidence corroborating this denial. (R.T. 137)

Notwithstanding the unreliability of police testimony as to oral accusations allegedly made by suspects during cus-

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[6]See Driver, *Confessions and the Social Psychology of Coercion*, 82 Harv. L. Rev. 42, 50-51 (1968).

todial interrogation, it is clear that such testimony is "powerfully incriminating" in the eyes of the jury, *Bruton v. United States*, 391 U.S. 123, 135 (1968), and does "inevitable harm" to the defendant named in the accusation. *Delli Paoli v. United States*, 352 U.S. 232, 248 (1957) (dissenting opinion of Frankfurter, J.). Juries of laymen, unfamiliar with the peculiar dangers of such evidence, unaware of the centuries of judicial hostility to it, cannot be expected to give it only the small weight it deserves; instead they vastly overvalue it. Thus, the rule excluding such evidence from the jury's consideration is "universally accepted." *Dutton v. Evans*, 400 U.S. 74 (Dec. 15, 1970) (opinion of Harlan, J.); see *Bruton v. United States*, 391 U.S. 123, 138 (1968) (concurring opinion of Stewart, J.). California now urges, however, that the Constitution places no bar in the way of the abandonment of this salutary rule where the suspect is in court to deny having made the accusations attributed to him by the police. See Pet. Br. at 11, 24.

II. UNLESS THE REPORTED ACCUSATORY STATEMENT IS AFFIRMED IN COURT BY THE SUSPECT WHO ALLEGEDLY MADE IT, POLICE TESTIMONY AS TO ITS CONTENTS CANNOT BE SPREAD BEFORE THE JURY DETERMINING THE ACCUSED'S GUILT WITHOUT UNCONSTITUTIONALLY DENYING THE ACCUSED HIS RIGHT TO CROSS-EXAMINE HIS ACCUSERS AS GUARANTEED BY THE CONFRONTATION AND DUE PROCESS CLAUSES.

Notwithstanding the inherent unreliability and devastating impact of the police testimony as to Runnels' alleged accusatory statement, California urges that because Runnels took the stand and denied making any statement, "even the use of his statement as substantive evidence against his co-defendant [O'Neil] is not constitutional error." Pet. Br. at 24; also 11.[7] In California's view, the fact that the

[7]California is forced to this position. *Bruton v. United States*, 391 U.S. 123 (1968) indisputably held that limiting instructions to the jury, such as were given in the instant case, are insufficient to protect

alleged accuser took the stand and denied making any statement means that the accused had an adequate opportunity to confront and cross-examine his accuser. This position is, however, contrary to the rationale of this Court's Confrontation Clause decisions and will not stand analysis.

The holding of the Court in *Douglas v. Alabama*, 380 U.S. 415 (1965) controls this case, as the court below recognized. (422 F.2d at 321; A. 114) There the petitioner and an alleged accomplice, one Loyd, were tried separately on charges arising out of the same incident. Loyd was tried first and convicted. He was planning to appeal his conviction, however, when he was called as a prosecution witness at the petitioner's trial. Loyd took the stand, but relying on the privilege against self-incrimination, he refused to testify concerning the alleged crime. The State was then allowed to "refresh Loyd's recollection" by reading, in the presence of the jury, Loyd's purported confession incriminating the petitioner as the triggerman in the crime. This Court reversed the petitioner's conviction on the ground that spreading Loyd's out-of-court accusations before the jury denied petitioner his right to cross-examination secured by the Confrontation Clause. In the words of the Court, "Loyd could not be cross-examined on a statement imputed to but not admitted by him. . . . [E]ffective confrontation of Loyd was possible only if Loyd affirmed the statement as his." 380 U.S. at 419-20.

The principles of *Douglas* were followed three years later in *Bruton v. United States*, 391 U.S. 123 (1968).[8] That decision, like the case at bar, involved a joint trial in which the prosecution spread before the jury testimony by an investigative officer that during custodial interrogation of

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an accused against the possibility that the jury will consider evidence of his co-defendant's incriminating statements in determining his guilt. And see *Jackson v. Denno*, 378 U.S. 368 (1964).

[8] *Douglas* was decided before O'Neil stood trial, and while *Bruton* was decided after his conviction had become final, it was held retroactive in *Roberts v. Russell*, 392 U.S. 293 (1968).

one of the accused, Evans, he obtained from him an oral statement which, as reported in court by the officer, incriminated not only Evans but also the other accused, Bruton. Evans, by not taking the stand, failed to affirm the statement attributed to him, and relying on *Douglas*, this Court held that *Bruton* was therefore denied his constitutional right of confrontation because of the introduction of Evans' accusations "in a form not subject to cross-examination." 391 U.S. at 127-28.

The case at bar is indistinguishable in principle from *Douglas* and *Bruton*.[9] Runnels, like Loyd and Evans, was in jeopardy for the same offense as his alleged accomplice, respondent O'Neil, and could not affirm his purported earlier statement without gravely endangering his own interests. While Loyd refused to affirm the purported statement by refusing to testify regarding the alleged crime, and Evans failed to admit the statement imputed to him by not taking the stand at all, Runnels refused to affirm the statement attributed to him by unequivocally denying that he had made any statement. The effect on O'Neil stemming from this denial was precisely the same as the effect on the petitioners in *Douglas* and *Bruton:* he was unable adequately to cross-examine his accuser.

It is only by misunderstanding the essential nature of cross-examination that one can assert that O'Neil had an adequate opportunity to cross-examine Runnels on the accusations attributed to him. The effectiveness of cross-examination as a truth-discovering technique may be said to depend upon at least two unique attributes of this means of developing evidence. First is the opportunity which cross-examination affords to elicit further evidence from the witness that qualifies or diminishes the credit of the testi-

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[9]The evidence of Loyd's accusations was somewhat more reliable than that involved here because Loyd's statements were embodied in a written document identified as having been signed by Loyd. (380 U.S. at 416-17)

mony given on direct examination.[10] The second relevant attribute of cross-examination is the critical fact that the evidence elicited on cross-examination has, generally, the same probative value as the evidence developed through the witness on direct examination.[11]

O'Neil's opportunity to question Runnels had neither of these attributes and hence did not amount to an opportunity to cross-examine him on the alleged statement. When Runnels denies having made any statement at all, O'Neil's counsel cannot effectively pursue lines of questioning designed to qualify or impeach the accusatory portions of the reported statement. To develop through Runnels evidence that the accusations in the statement stemmed from, *e.g.*, his anger at O'Neil for apparently "putting all the blame on him" (*supra*, p. 3) is extremely difficult, at best, when Runnels is resistant to any suggestion that he might

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[10]See 5 Wigmore, *Evidence*, §1368, at 33-34 (3d ed. 1940); Busch, *Law and Tactics in Jury Trials*, §285 at 460 (1949). To the extent that such qualifying or impeaching evidence can as a practical matter be developed only from the witness himself (as where the matters to be explored are peculiarly within his knowledge), "cross-examination is vital, *i.e.*, it does what must be done and what nothing else can do." 5 Wigmore, *op. cit. supra*, at 34.

[11]If the witness's testimony on direct examination (*e.g.*, his accusation of the defendant) is to be credited by the jury, so ordinarily must his testimony on cross-examination (*e.g.*, his recantation, his testimony as to circumstances casting doubt on the truth of the accusation), for both come out of the mouth of the same witness. See 5 Wigmore, *Evidence*, §1368, at 34 (3d ed. 1940): "[C]hiefly, the advantage is that the cross-examined witness *supplies his own refutation*. . . . If we believed the answers on direct examination, we must also believe the answers on cross-examination." (Emphasis in original.) Likewise, if the witness's testimony on cross-examination is discredited (*e.g.*, by inconsistencies, or by contradiction through other, more credible evidence), then the testimony on direct examination is discredited too, for the same witness affirmed the truth of both. See McCormick, *Evidence*, §33, §47 at 102 & n. 17 (1954). Compare the instruction given to the jury in the instant case: "A witness wilfully false in one material part of his or her testimony is to be distrusted in others." (A. 242.)

have said anything at all to his interrogators. More critically, it is quite impossible to probe the reported statement for damaging omissions, errors or inconsistencies when its alleged maker will not admit having made it.[12] If, but only if, the statement had been affirmed by Runnels in direct examination, none of these difficulties would have stood in the way of a true cross-examination by O'Neil's counsel.

The fact that O'Neil could not cross-examine Runnels on the alleged statement is seen even more vividly when one considers the total lack of any connection between the probative value of the reported accusation and the probative value of Runnels' denial that he made the accusation. The jury can and will readily discount the defendant Runnels' denial that he made a statement that incriminates himself as well as O'Neil, yet at the same time the jury can and will credit what he reportedly said in that statement about O'Neil.

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[12]At this distance it is obviously impossible to imagine all the myriad ways in which genuine cross-examination could have tested the alleged Runnels' statement and perhaps diminished its credibility. One concrete example may be suggestive, however. As reported, the statement says that O'Neil and Runnels went into the Culver City liquor store for the purpose of robbing it but did not do so because too many people were in it. See Appendix, *infra*. Yet the undisputed evidence in the case placed O'Neil and Runnels in the vicinity of the liquor store at approximately 1:00 A.M. on a Tuesday morning, when the store was hardly likely to be crowded, and the liquor store owner, who was reportedly alarmed by O'Neil and Runnels as they drove by in a car, said nothing about them ever entering the store. *Supra*, p. 3. Cross-examination of a witness affirming the alleged statement could have nailed down the details as to how long they were supposedly in the store, who saw them there, what they did in the store, how many other people were in the store, etc. Then, with the witness firmly committed to his story, he might have been dramatically impeached—and his accusation seriously undermined—by defense proof through other witnesses that, *e.g.*, there was only one customer in the liquor store after 12:30 A.M., O'Neil and Runnels never entered the store, etc. See McCormick, *Evidence*, § 47, at 102-03 (1954). (For an account of an equivalent use of cross-examination by Abraham Lincoln in the famous Duff Armstrong case, and for other illustrations, see Busch, *Law and Tactics in Jury Trials*, § 303, at 493-94 (1949).)

The credibility of the reported accusatory statement is equally independent of the credibility of any alibi or other contradictory testimony elicited from Runnels on the stand. Because Runnels does not affirm the accusatory statements attributed to him, it is *not* true (as it would be in a real cross-examination situation) that if we believed the accusatory statements, we must also believe the denial, the alibi and the other in-court testimony of Runnels. *Cf.* 5 Wigmore, *Evidence*, §1368 at 34 (3d ed. 1940). Because Runnels has not placed his credibility behind the reported accusatory statements, it is *not* true (as it would be in a true cross-examination situation) that a successful impeachment of his testimony given in response to O'Neil's counsel's questions will also impeach the accusation. *Cf.* McCormick, *Evidence*, §47 at 102 & n. 17 (1954). Therefore, the opportunity which O'Neil had to question Runnels was *not* an opportunity to cross-examine him on the alleged accusation.[13]

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[13]Two additional factors may be briefly mentioned, further indicating that O'Neil's opportunity to question Runnels was not an opportunity to cross-examine him on his alleged accusation.

(1) The demeanor of a witness is unquestionably important in determining whether his testimony is worthy of belief. *E.g., Mattox v. United States*, 156 U.S. 237, 242-43 (1895). One important function of cross-examination is that it not infrequently succeeds in making a witness "reveal by his demeanor–his tone of voice, the evidence of fear which grips him at the height of cross-examination, or even his defiance–that his evidence is not to be accepted as true, either because of partiality or overzealousness or inaccuracy, as well as outright untruthfulness." *Government of Virgin Islands v. Aquino*, 378 F.2d 540, 548 (3d Cir. 1967). To the extent that Runnels' demeanor was poor, and were it to have been revealed as such under questioning by O'Neil's counsel, it would not be the reported accusation that the jury would regard as having been undermined, but rather Runnels' denial of that accusation.

(2) Leading questions to a witness are normally forbidden on direct examination but permitted on cross. McCormick, *Evidence*, §6 at 10 (1954). The nature of the examination which O'Neil's counsel could have made of Runnels is revealed by the authorities supporting the proposition that in the instant case the court could properly have prohibited O'Neil's counsel from asking Runnels leading questions,

Runnels on the stand, before the jury in open court, is not the accuser, and for O'Neil to examine him is not to cross-examine his accuser. O'Neil's accuser—if one there be—is Runnels under custodial interrogation, forever removed from the possibility of cross-examination, forever cloaked in the impenetrable mantle of the police officer's testimony as to what was said and not said at that secret time. The opportunity which O'Neil had to elicit testimony from Runnels contradicting the accusations attributed to him by the police officer was, at most, an opportunity to *rebut* those accusations. This rebuttal opportunity which O'Neil had through Runnels was no substitute for his right to cross-examine his accuser. That is painfully apparent when one considers Runnels' credibility in the case: he stands before the jury "accused side-by-side with the defendant" (*Bruton v. United States*, 391 U.S. 123, 136 (1968)), with every apparent reason of self-interest to deny a statement that incriminates him as well as O'Neil.[14]

California v. Green, 399 U.S. 149 (1970) affords no constitutional sanction for the position that an opportunity to rebut an accuser's evidence can, on the facts of the case at bar, substitute for an opportunity to cross-examine the accuser. In *Green* the evidence of out-of-court accusatory statements which this Court held to have been properly admitted was the transcript of a witness' testimony given at a preliminary hearing, subject to full cross-examination by the accused—not a police officer's testimony as to an unrecorded oral accusation made by a suspect during cus-

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at least so long as Runnels was unwilling to affirm his accusation of O'Neil. See Busch, *Law and Tactics in Jury Trials*, § 306 (1949); also *Mitchell v. United States*, 213 F.2d 951, 954-56 (9th Cir. 1954), *cert. denied*, 348 U.S. 912 (1955).

[14]The prosecutor in the instant case knew well that he was on safe ground when he addressed the jury in closing argument (A. 223):

> "When you say who is telling the truth, you are going to have judge between Officer Traphagen and this defendant, because they both can't be telling you the truth about that statement, whether there was one made or not, and you are going to have to consider who has got the most reason to lie. . . ."

todial interrogation.[15] To the extent that the Court found that the out-of-court statements were admissible because the declarant testified as a witness at the trial, its conclusion was that "the Confrontation Clause does not require excluding from evidence the prior statements of a witness *who concedes making the statements*" and thus opens himself to cross-examination on those statements. 399 U.S. at 164 (emphasis supplied).[16]

Nor is the result in *Dutton v. Evans*, 400 U.S. 74 (Dec. 15, 1970) any support for California's position in the instant case. There the out-of-court statement was not a detailed, blame-shifting accusation allegedly made in the coercive atmosphere of official interrogation and reported in court by the police interrogator; rather, it was only a single spontaneous remark of doubtful import reported by a fellow prisoner. Lacking the indicia of untrustworthiness and the devastating impact of the accusation in the case at bar, the remark in *Evans* obviously posed a far less serious Confrontation Clause question.

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[15]Such police testimony had also been admitted in *Green*, but this Court did not reach the question of whether that was proper under the Confrontation Clause. See 399 U.S. at 169-70. Even if it had, however, the holding would not have controlled the case at bar, since the witness-suspect "admitted making the statement . . . and insisted that he had been telling the truth as he then believed it . . . ." *Id.* at 152.

[16]The significance in *Green* of the witness's affirming the out-of-court statements was emphasized in a brief submitted by the United States as *amicus curiae*, which concluded that where the witness denied making the statement, the accused is unable effectively to test the truth of the allegations that concern him. See Brief for the United States as Amicus Curiae, *California v. Green*, Oct. Term 1969, No. 387, p. 30 & n. 15. (Although the issue was not there discussed, *Harrington v. California*, 395 U.S. 250 (1969) is similarly distinguishable from the case at bar in that the codefendant Rhone affirmed the incriminating statement attributed to him and gave detailed testimony about the contents of transcript of the statement. Record, *Harrington v. California*, Oct. Term 1968, No. 750, at 410-11, 413-16 *et seq.*)

Finally, it may be appropriate to observe that adherence to the principles of *Douglas* and *Bruton* in the instant case will not disrupt or unduly complicate procedures for criminal trials. If in a joint trial situation the state wishes to safeguard its ability to use, whether as part of its case in chief or for impeachment or rebuttal of the defense's evidence, police evidence of a defendant's oral, unrecorded custodial statement involving elements both of confession and of accusation of a co-defendant, then the state can explore with the court whether omitting reference to the accusatory portions of the alleged statement is feasible without prejudicing either defendant, or whether, as is more likely, the defendants should be severed and tried separately.[17]

In the separate trial of the defendant who reportedly made the statement, the evidence of his statement can, if otherwise admissible, be offered to incriminate him. In the separate trial of the defendant who was reportedly accused in that statement, evidence of the statement would be inadmissible, unless it was affirmed in court by its maker, *Douglas v. Alabama, supra*, or, perhaps, its maker gave testimony inconsistent with the alleged statement as a witness called by the defense[18] (in which case evidence of the statement, notwithstanding its untrustworthiness, could arguably be used by the prosecution for impeachment). Compare *Harris v. New York*, ___ U.S. ___ (Feb. 24, 1971).

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[17]This is the procedure already required by *Bruton* (see 391 U.S. at 143-44 (dissenting opinion of White, J.)) and recommended by the American Bar Association Project on Minimum Standards for Criminal Justice. See ABA Standards, *Joinder and Severance*, §2.3(a) (Approved Draft, 1968). (Indeed, the A.B.A. Adivsory Committee on the Criminal Trial recommended this procedure in the interests of fairness even *before Bruton* was decided. See *id.* (Tentative Draft, Nov. 1967).)

[18]In the typical joint trial situation, as in the case at bar (*supra*, p. 4), the allegedly accusing codefendant takes the stand on his own behalf and for his own purposes, and not at the behest of the accused defendant.

III. THE CONSTITUTIONAL ERROR OF LAYING THE POLICE OFFICER'S EVIDENCE OF RUNNELS' UNAFFIRMED ACCUSATION OF O'NEIL BEFORE THE JURY CHARGED WITH DETERMINING O'NEIL'S GUILT CANNOT, ON THIS RECORD, BE SAID TO HAVE BEEN HARMLESS BEYOND A REASONABLE DOUBT; NOR WOULD ANY POLICY UNDERLYING THE DOCTRINE OF EXHAUSTION OF REMEDIES BE SERVED BY REQUIRING O'NEIL TO PRESENT THIS CLAIM OF ERROR TO THE STATE COURTS YET ANOTHER TIME.

A. Harmless Error

California's efforts to secure reversal of the decision below on grounds of harmless error or lack of exhaustion are not convincing. The argument that admitting the police testimony as to Runnels' purported accusation of O'Neil was harmless error is predicated upon the erroneous premise that such error can be harmful "only if the co-defendant's confession has a devastating impact upon the non-confessing defendant's defense." (Pet. Br. at 25) But to require the victim of constitutional error to show that it had a "devastating impact" on his defense is to stand the test of harmless error exactly on its head.

The proper standard of harmless error is the one announced by this Court in *Chapman v. California*, 386 U.S. 18 (1967), and applied in *Harrington v. California*, 395 U.S. 250 (1969). In *Harrington*, the Court reaffirmed the *Chapman* standard that:

> "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." 395 U.S. at 251, citing 386 U.S. at 24.

While it may be that *Harrington* also approved a substantially similar "overwhelming evidence" test,[19] it is clear that

[19] At the end of its opinion in *Harrington*, the Court noted that the evidence of guilt separate from that admitted in error was "so overwhelming that unless we say that no violation of *Bruton* can con-

Harrington established no rule that a violation of the Confrontation Clause must be considered harmless unless it can be shown that the erroneously admitted evidence had "a devastating impact" upon the defendant's case.[20]

Under the proper harmless error standard, the erroneous admission of the police testimony as to Runnels' alleged statement cannot be said to have been harmless. No part of the State's case against O'Neil had escaped substantial challenge. Through the testimony of six different witnesses, O'Neil established a consistent, unshaken alibi defense that both placed him and Runnels away from the scene at the time of the offense and provided an explanation for his subsequent arrest in the victim's car. *Supra*, pp. 4-5. Moreover, there was evidence of circumstances raising the possibility of a mistaken identification by the victim,[21] and in his closing argument to the jury the prosecutor relied heavily

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stitute harmless error, we must leave this state conviction undisturbed." 395 U.S. at 254. See Note, *Harmless Constitutional Error: A Reappraisal*, 83 Harv. L. Rev. 814, 819 (1970).

[20] Of the nearly two dozen Court of Appeals cases subsequent to *Harrington* that have applied the harmless error doctrine to *Bruton* claims, respondent has not found a single decision holding that *Bruton* error is harmful only if a "devastating impact" is shown. Without exception these decisions have read *Harrington* as reaffirming the *Chapman* "beyond a reasonable doubt" standard, or, at the least, as sanctioning the equivalent "overwhelming evidence" test. *E.g., Alley v. United States*, 426 F.2d 877, 880-81 (8th Cir. 1970). The Court of Appeals cases cited by petitioner are, with one exception, pre-*Harrington;* only one, *United States v. Levinson*, 405 F.2d 971, 988 (6th Cir. 1968), *cert. denied* 395 U.S. 958 (1969), *reh. denied* 396 U.S. 869 (1969), even begins to suggest a "devastating impact" test, and only then in an elliptic alternative holding. The one post-*Harrington* Court of Appeals case cited by petitioner, *United States v. Carlson*, 423 F.2d 431 (9th Cir.), *cert. denied* 400 U.S. 847 (1970), like the plurality opinion in *Dutton v. Evans*, 400 U.S. 74 (Dec. 15, 1970) and most of the remainder of petitioner's Court of Appeals cases, deals with the scope of the *Bruton* principle in the first instance, not with the appropriate harmless error standard to apply once a *Bruton* violation has been found.

[21] This evidence was summarized in closing argument by O'Neil's counsel at A. 208-11.

upon the evidence of the alleged Runnels statement to corroborate the victim's identification. *Supra*, p. 5). (By contrast, in *Harrington* the improperly admitted confessions of two co-defendants added nothing to the overwhelming evidence of the other witnesses, including Harrington himself. See 395 U.S. at 253-54.)

With the evidentiary record in this condition, the Court of Appeals correctly concluded that it was "more likely than not that Runnels' statement dispelled the doubts of the jury." (422 F.2d at 323; A. 118)

B. Exhaustion

California's exhaustion argument (Pet. Br. at 28-29) appears to be largely *pro forma*, perhaps because petitioner would like to have a definitive resolution of the recurring practical question which it has brought to this Court. In any event, there is no basis for quarreling with the conclusion of the Court of Appeals herein that the interests of comity between state and federal judicial systems, as well as fairness to the prisoner O'Neil, are best served by passing upon his claim and not requiring him to take it once again to the state courts. (422 F.2d at 323-24; A. 119-21) California's contrary view is evidently based on the notion that *Bruton v. United States*, 391 U.S. 123 (1968) created "new constitutional standards" (Pet. Br. at 29), thus requiring the termination of O'Neil's on-going federal habeas proceeding and a further application by him to the state courts.[22]

Passing the question of whether any such Procrustean rule of further exhaustion is in fact applied in the federal courts (compare *Pope v. Harper*, 407 F.2d 1303 (9th Cir. 1969) with *United States ex rel. Walker v. Fogliani*, 343 F.2d 43

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[22] *Bruton* was decided on May 20, 1968, and *Roberts v. Russell*, 392 U.S. 293, holding *Bruton* retroactive, came down on June 10, 1968. O'Neil's federal habeas proceeding had commenced on April 25, 1968. (A. 28)

(9th Cir. 1965)), or if such a rule is applied, whether it ought to be (see Note, *Developments In the Law–Federal Habeas Corpus*, 83 Harv. L. Rev. 1038, 1101-02 (1970)), it is clear that it has no application to the instant case. *Bruton* did not give O'Neil a "new" federal ground for relief–it merely furnished additional authority in support of the claim under the Sixth and Fourteenth Amendments that he had already presented to the state courts. *Supra*, p. 6. O'Neil stood trial after *Pointer v. Texas*, 380 U.S. 400 (1965) and *Douglas v. Alabama*, 380 U.S. 415 (1965) had established his rights under the Confrontation Clause,[23] and after *Jackson v. Denno*, 378 U.S. 368 (1964) had made it clear that limiting instructions to the jury would be insufficient to prevent invasion of those rights.[24] The fact that it subsequently became possible for O'Neil to cite *Bruton* as additional support for his objection to the police evidence of Runnels' alleged statement is no reason for sending him back to the state courts to present exactly the same constitutional claim yet another time. See *Anderson v. Nelson*, 390 U.S. 523 (1968); *Roberts v. LaVallee*, 389 U.S. 40 (1967).

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[23] *Douglas* and *Pointer* came down on April 5, 1965; O'Neil's trial commenced on May 13, 1965. (A. 170)

[24] The California Supreme Court first considered the relevance of *Jackson*, *Pointer* and *Douglas* to cases such as O'Neil's more than two years before it denied O'Neil's habeas petition. See *People v. Aranda*, 63 Cal.2d 518, 407 P.2d 265, 47 Cal. Rptr. 353 (1965), cited in *Bruton v. United States*, *supra*, at 130-31.

CONCLUSION

For the reasons stated herein, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX

[Testimony of Officer Russell M. Traphagen relating the substance of the conversation which he testified to having with Runnels, A. 137-139:]

He stated that O'Neil had came to his place on the afternoon of the 9th. [*]

He stated O'Neil asked him if he wanted to make a couple of hits.

He stated that he told O'Neil yes, he would.

He stated that they then went down to the Better Foods Market at the corner of Santa Barbara and Western Avenue.

He stated that O'Neil gave him $16.

He stated they went inside the market.

I asked him if they had attempted to hold up the market.

He stated they had not.

He stated they then went outside to the parking lot of the market where they observed this man in a white Cadillac.

He stated that O'Neil had the gun; that O'Neil went up to the driver on the passenger side of the vehicle, ordered the man in the car to sit where he was; that he got in the back of the vehicle—referring to Runnels.

He stated that they made this man drive them over on St. Andrews Place to a certain location; that they then made the man get out of the vehicle after robbing him.

He stated that he then drove the vehicle, the Cadillac, and that they then went to Culver City.

He stated that they had gotten out of the vehicle in Culver City and gone to this liquor store.

He stated they went into the liquor store.

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*The witness subsequently amended this date to the 8th of February. (A. 140)

He stated that they then left the liquor store because there were too many people there.

They went back on down to the front of the liquor store. There were still too many people in there.

He stated that they then circled the block a few times, at which time the Culver City Police Department arrested them.

* * * * *

He stated there were too many people in the liquor store at the time, and they were waiting for less customers and less people to be in the liquor store, and they were going to go back and rob it.